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### **Novel Smoke-free Zones and the Right to Respect for Private Life under Article 8 of the European Convention on Human Rights (on the occasion of the Dutch Decree of 22 June 2020, amending the Tobacco and Smokers' Order introducing the obligation to impose, designate and enforce a smoking ban in the areas belonging to buildings and facilities used for education)**

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## **Novel Smoke-free Zones and the Right to Respect for Private Life under Article 8 of the European Convention on Human Rights (on the occasion of the Dutch Decree of 22 June 2020, amending the Tobacco and Smokers' Order introducing the obligation to impose, designate and enforce a smoking ban in the areas belonging to buildings and facilities used for education)**

**Aikaterini Tsampi**

### **ABSTRACT**

As of 1 August 2020, the Dutch educational institutions have become smoke-free spaces by virtue of the Decree of 22 June 2020. Depending on the circumstances, the smoking ban may apply not only to enclosed public spaces but to outdoor and semi-private ones as well. The new regulation qualifies thus as a 'novel smoke-free policy'. Such policies raise complex human rights questions, predominantly under the right to respect for private life. The present article explores the compatibility of the Dutch regulation and novel smoke-free policies with Article 8 of the European Convention on Human Rights.

### **RESUME**

Depuis le 1<sup>er</sup> août 2020, les établissements d'enseignement néerlandais sont des espaces non-fumeurs en vertu du décret du 22 juin 2020. Dans ce contexte, l'interdiction de fumer s'applique non seulement à l'espace public clos mais aussi aux lieux extérieurs ou semi-ouverts et introduit une nouvelle politique d'interdiction qui a une portée quasi-absolue. Elle soulève cependant plusieurs questions complexes et inédites en matière de droits de l'homme, principalement vis-à-vis du droit au respect de la vie privée. Le présent article explore les implications et la compatibilité de cette politique antitabac sous le prisme de l'article 8 de la CEDH.

**KEYWORDS:** novel smoke-free zones, tobacco control - educational institutions - right to respect for private life - article 8 European Convention on Human Rights - the Netherlands - framework convention on tobacco control

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# **Novel Smoke-free Zones and the Right to Respect for Private Life under Article 8 of the European Convention on Human Rights (on the occasion of the Dutch Decree of 22 June 2020, amending the Tobacco and Smokers' Order introducing the obligation to impose, designate and enforce a smoking ban in the areas belonging to buildings and facilities used for education)**

**Aikaterini Tsampi\***

## **1. INTRODUCTION**

The current COVID-19 crisis brought to the forefront the protection of public health in a stark way. Along with so many other changes, this global health crisis changed the way individuals act and interact both in public and private spaces. Certain spaces are inaccessible and, in those that remain accessible, certain conduct within them is either no longer allowed (e.g. certain social gatherings) or is now prescribed (e.g. wearing masks ; keeping distances). It comes as no surprise, therefore, that the current COVID-19-related legal debate revolves around the scope of limitations on human rights. Without disregarding, the particularities of a crisis such as the one we are now globally experiencing, it is to be noted that the regulation of human activity in public or private spaces for the protection of public health is nothing new. Smoking bans are one of the most prominent examples. The human rights implications of such bans have been creating dilemmas that have not necessarily been resolved in a definitive way and continue to raise complexities especially in the light of the expansion of smoke-free zones.<sup>1</sup>

One such example is the new Dutch regulation on smoke-free educational institutions, including universities. While the facilities of Dutch universities are only partially accessible due to the COVID-19 crisis, they are, as from 1 August 2020, along with all the other educational buildings and facilities across the country, smoke-free. In implementation of the relevant provisions of the Tobacco and Smoking Products Act,<sup>2</sup> the Dutch decree of 22

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<sup>1</sup> The terms 'smoking ban(s)' and 'introduction of smoke-free zones' will be used interchangeably throughout this article, even though the aspiration of tobacco control is not to impose bans but to create spaces that are free of smoke. The use of the term 'smoking ban' is of pertinence here, first because it is the term employed by the 2020 Dutch Decree itself, and second because the scope of the research focuses on the restrictions of the rights of the persons who wish to smoke rather than on the positive right in the creation of smoke-free spaces.

<sup>2</sup> Articles 5(3), 10(2) and (2)(a), 11(c)(2) Tobacco and Smoking Products Act: '[Tabaks- en rookwarenwet \(Tobacco and Smoking Products Act\)](#)', 1 July 2020 [last accessed 20 August 2020].

June 2020 ('2020 Dutch Decree') amended the Tobacco and Smokers' Order requiring authorities to impose, designate and enforce a smoking ban in the areas belonging to buildings and facilities used for education.<sup>3</sup> The new regulation has made it illegal to smoke on a wide range of spaces, both indoors and outdoors, used for educational purposes. Depending on the circumstances, the smoking ban may apply to open air spaces, sports fields, sites shared by educational institutions and companies, student houses located on a campus, open roads, bicycle paths or footpaths on a campus site for public traffic.<sup>4</sup>

The variability of the regulated spaces introduces what can be termed 'novel smoke-free regulation'.<sup>5</sup> As part of a tobacco regulation strategy, existing smoke-free regulations in enclosed public places are now being expanded in various places across the globe to also cover outdoor and private spaces, henceforth referred to as 'novel smoke-free policies'.

[Novel] smoke-free policies build on public health imperatives but inevitably raise questions of compatibility with human rights standards, particularly<sup>6</sup> with the right to respect for private life. The present article will scrutinize the new Dutch regulation in light of Article 8 of the European Convention of Human Rights (ECHR).<sup>7</sup> The present article will first explore the developments triggered by the new Dutch regulation (**Section 2**) with a view to discuss its compatibility with the right to private life as enshrined in the ECHR (**Section 3**).

## 2. THE DEVELOPMENTS UNDER THE DUTCH REGULATION

The new Dutch regulation marks a twofold development, which will be discussed below. From a national perspective, it allows for the expansion of the smoke-free zones to protect public health, in particular, the health of young people (Section A) and, from a global perspective, it adds the Netherlands to the list of countries that have introduced centrally

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<sup>3</sup> 'Besluit van 22 juni 2020, houdende wijziging van het Tabaks- en rookwarenbesluit ter introductie van de verplichting een rookverbod in te stellen, aan te duiden en te handhaven op de terreinen die horen bij gebouwen en inrichtingen die worden gebruikt voor onderwijs (Decree of 22 June 2020, amending the Tobacco and Smokers' Order introducing the obligation to impose, designate and maintain a smoking ban in the areas belonging to buildings and facilities used for education', 29 June 2020, available at: <https://zoek.officielebekendmakingen.nl/stb-2020-218.html> [last accessed 20 August 2020] (Decree of 22 June 2020).

<sup>4</sup> Ibid. at Explanatory Note.

<sup>5</sup> Global Health Law Groningen Research Centre, '[Novel Smoke-free Policies](#)' (2019) [last accessed 20 August 2020].

<sup>6</sup> The creation of smoke-free zones might raise issues pertaining to a number of rights beyond the right to respect for private life, such as the freedom of movement, the right to an adequate standard of living and the protection of property.

<sup>7</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos 11 and 14, 4 November 1950, ETS 5. According to Articles 93-94 of the Dutch Constitution self-executing provisions of treaties and of resolutions of international organizations are binding upon natural and legal persons and have supremacy over national law, including the Constitution, Acts of Parliament and subordinate legislation. The Explanatory Note of the Decree of 22 June 2020 itself addresses the compatibility of the smoking ban with human rights through the provisions of Article 8 of the ECHR: see Decree of 22 June 2020, *supra* n 3.

novel smoke-free zones, such as outdoors spaces, raising, thus, questions pertaining to the scope of the WHO Framework Convention on Tobacco Control (FCTC)<sup>8</sup> (Section B).

### **A. The Decree of 22 June 2020 and the Expansion of Smoke-free Zones in the Netherlands**

Article 10 of the Dutch Tobacco and Smoking Products Act introduced smoking bans in a number of spaces, such as buildings or establishments in use by the State or another public body ; buildings or establishments used by an institution or association for health care, welfare, social services, art and culture, sport, socio-cultural work or education ; rooms, buildings or establishments where an employee performs or usually performs his/her work ; catering establishments ; means of passenger transport ; aircrafts during use for civil aviation on flights to and from airports located on Dutch territory.<sup>9</sup> The same provision allows for the adoption of rules on the establishment, designation and enforcement of a smoking ban on the sites belonging to a building or establishment that is used by an educational institution,<sup>10</sup> which is where the 2020 Dutch Decree becomes relevant.

Article 1 of the 2020 Dutch Decree amended the existing Tobacco and Smokers' Order<sup>11</sup> with the insertion of Article 6.4 which provides that the person managing a building or establishment that is used by a school or an educational institution<sup>12</sup> is obliged to institute, designate and enforce a smoking ban in the associated area where (a) the site is adjacent to or located in the immediate vicinity of that building or establishment ; (b) that building or establishment is used for education ; and (c) the site is in use at the school or institution.<sup>13</sup>

The introduction of smoke-free policies in spaces used for education purposes builds on the Dutch National Prevention Agreement, which expressed the ambition to achieve a smoke-free generation in its population by 2040.<sup>14</sup> It sets, in particular, the standard that smoking is not normal and that children and young people should not smoke.<sup>15</sup>

While the main provision of the new regulation is clear, the scope of the smoking ban requires further attention. Special mention should, indeed, be made of the fact that the new regulation also creates outdoor(s) smoke-free zones. While amended Article 6.2(1)(c) of

<sup>8</sup> WHO Framework Convention on Tobacco Control 2003, 2302 UNTS 166 (FCTC), adopted in 2003 and entered into force on 27 February 2005.

<sup>9</sup> Article 10(1) Tobacco and Smoking Products Act.

<sup>10</sup> Article 10(2) Tobacco and Smoking Products Act.

<sup>11</sup> [‘Tabaks- en rookwarenbesluit \(Tobacco and Smokers' Order\)’](#), 30 June 2020 [last accessed 20 August 2020].

<sup>12</sup> The scope of the Decree of 22 June 2020 covers schools or educational institutions in primary education, secondary education, special education, secondary vocational education, higher professional education and scientific education.

<sup>13</sup> Decree of 22 June 2020, *supra* n 3.

<sup>14</sup> The Dutch Government published a ‘National Prevention Agreement’ on 23 November 2018, announcing several control measures on tobacco use. It had been agreed in the Prevention Agreement that the obligation to introduce a smoking ban in the fields of educational institutions would come into effect in 2020: see [‘Nationaal Preventieakkoord - The National Prevention Agreement’](#), English report of 30 June 2019, at 16 [last accessed 20 August 2020].

<sup>15</sup> Decree of 22 June 2020, *supra* n 3 at Explanatory Note.

the Tobacco and Smokers' Order provided that the introduction of smoke-free spaces did not apply in open air areas, the new Article 6.4 abrogates from this exception for the educational institutions that fall within its scope of application : (uncovered) courtyards, patios, balconies, roof terraces or roofs associated to an educational institution will now be smoke-free from 1 August 2020 onwards.

The new regulation marks a watershed moment in Dutch legislation, which is of great pertinence, not only because it aspires to protect young people and inspire a smoke-free generation, but also because it expands the type of smoke-free spaces. As noted by Toebe and Bantema, critics have warned that Dutch legislation and policy increasingly lag behind that of other countries when it comes to regulating tobacco use ; among others, there has been criticism of the lack of a firm smoking ban in all (public and/or private) spaces.<sup>16</sup>

The implementation of smoking bans in the Netherlands has not been without controversy since the introduction of the first smoking spaces in the country.<sup>17</sup> Since the Dutch Tobacco Act was first adopted in 1988 to prohibit smoking in all public buildings and on public transport, it been repeatedly amended to include increasingly more smoke-free spaces. In 2004, non-hospitality workplaces (except separately ventilated areas not serviced by employees) became smoke-free and the same occurred in 2008 for shopping malls, tobacco shops, gaming establishments and convention centres.<sup>18</sup> The 2008 amendment also covered restaurants, cafes, bars, festival tents and nightclubs (except in separately ventilated areas that are not serviced).<sup>19</sup> The smoking regulation in small bars and in venues with a separate, enclosed, designated smoking space has, however, been controversial.<sup>20</sup> The prohibition of smoking in Dutch bars has been addressed by two decisions of the Dutch Supreme Court, which ruled in 2010 and 2014 that the smoking ban must also apply to small owner-run pubs and cafes without employees.<sup>21</sup> While the prohibition of smoking in all bars was implemented from January 2015 onwards, the exception that allowed for smoking in designated rooms would remain.<sup>22</sup> It was only recently on 27 September 2019 that the Dutch Supreme Court ruled that all smoking areas in the hospitality industry should be banned.<sup>23</sup>

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<sup>16</sup> Toebe and Bantema, '[Tobacco Control Legislation in the Netherlands](#)', *University of Groningen Faculty of Law Research Paper 18/2017*, 5 May 2016 [last accessed 20 August 2020].

<sup>17</sup> For an overview, see Willemsen, *Tobacco Control Policy in the Netherlands: Between Economy, Public Health, and Ideology* (2018).

<sup>18</sup> Toebe and Bantema, *supra* n 16.

<sup>19</sup> *Ibid.*

<sup>20</sup> For a general analysis, see Gonzalez and Glantz, 'Failure of policy regarding smoke-free bars in the Netherlands' (2013) 23(1) *European Journal of Public Health* 139-145.

<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid.*

<sup>23</sup> *De Staat der Nederlanden (Ministerie van Volksgezondheid, Welzijn en Sport) v Nederlandse Nietrokersvereniging CAN (Club Actieve Nietrokers)*, ECLI:NL:HR:2019:1449 (Supreme Court of the Netherlands, 2019), 27 September 2019, available at <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2019:1449> [last accessed 20 August 2020]. The Dutch Supreme Court considered Article 8 of the WHO Framework Convention on Tobacco Control. For the enforceability of this provision before Dutch courts, see Karapetian and Toebe, '[The legal enforceability of Articles 5-3 and 8-2 FCTC in the Netherlands](#)', 22 May 2018 [last accessed 20 August 2020].



These observations refer to regulation at a central level. However, Dutch practice offers examples of local initiatives that move towards a more ambitious regulation of smoke-free spaces. The example of the city of Groningen remains the most prominent one since it aspires to become the Netherlands' first no-smoking city. Some playgrounds and schools are already smoke-free zones, smoking is discouraged in higher education and, as of 2018, smoking is banned in and around the entrances to many public buildings.<sup>24</sup> As it has been observed, a smoking ban around public buildings is probably feasible, but no-smoking streets may, at present, be difficult to achieve.<sup>25</sup>

This point is of relevance since under the new regulation, depending on the circumstances of each case, the expansion of smoke-free zones in educational institutions may be even broader to cover sports fields, sites shared by educational institutions and companies, student houses located on a campus, open roads, bicycle paths or footpaths on a campus site for public traffic. A university campus will therefore, most likely, be composed of areas that must be smoke-free interspersed with areas that are not necessarily smoke-free.<sup>26</sup> For this reason, the Explanatory Note of the Decree notes that it is highly desirable that the educational institutions enter into dialogue with other parties, such as municipalities, private individuals or companies, to ensure a workable, and as uniform as possible, situation is created.<sup>27</sup> Thus, apart from the fact that the new regulation on educational institutions formally creates novel smoke-free zones at a national level, with particular emphasis on the protection of the youth, it also creates new opportunities for *ad hoc* smoke-free arrangements on a number of different spaces.

## B. The Expansion of Novel Smoke-free Zones from a Global Perspective

From a global perspective, the 2020 Dutch smoke-free regulation for educational institutions is not novel. The introduction of smoke-free educational spaces is a widespread global phenomenon justified by the proven vulnerability of children to tobacco-related harm and by the legitimate claim for the human rights-related interests of children in tobacco control.<sup>28</sup> The protection of youth in general is also gaining momentum with educational institutions across the world increasingly moving towards smoke-free campuses.<sup>29</sup> Nevertheless, to what extent can States proceed with the regulation of smoke-

<sup>24</sup> Toebees and Hylkema, [‘Will Groningen be the first city to ban smoking altogether?’](#), *University of Groningen News*, 9 October 2018 [last accessed 20 August 2020].

<sup>25</sup> Ibid.

<sup>26</sup> Decree of 22 June 2020, supra n 3 at Explanatory Note.

<sup>27</sup> Ibid.

<sup>28</sup> Gispén and Toebees, ‘The Human Rights of Children in Tobacco Control’ (2019) 41 (2) *Human Rights Quarterly* 340-373.

<sup>29</sup> Barnsley and Freeman, ‘15.5 Smoking bans in outdoor areas’ in Greenhalgh, Scollo and Winstanley (eds), *Tobacco in Australia: Facts and issues* (2020), available at: <https://www.tobaccoinaustralia.org.au/chapter-15-smokefree-environment/15-5-outdoor-areas> [last accessed 20 August 2020]. In the United States of America, there are now at least 2,509 100 per cent smoke-free campus sites: see Americans Non-smokers Rights Foundation, [‘Smokefree and Tobacco-Free U.S. and Tribal Colleges and Universities’](#), 1 July 2020 [last accessed 20 August 2020].

free zones ? What are the legal grounds for the introduction of smoke-free spaces shared by educational institutions and companies, of smoke-free student houses located on a campus or open roads, bicycle paths or footpaths on a campus site ?

The FCTC,<sup>30</sup> which regulates tobacco control at a global level and was ratified by the Netherlands on 27 January 2005, provides some important indicators. This international instrument is now one of the most widely ratified international treaties.<sup>31</sup> Its Article 8 provides :

Each Party shall adopt and implement in areas of existing national jurisdiction as determined by national law and actively promote at other jurisdictional levels the adoption and implementation of effective legislative, executive, administrative and/or other measures, providing for protection from exposure to tobacco smoke *in indoor workplaces, public transport, indoor public places and, as appropriate, other public places*'.<sup>32</sup>

While the provision seems clear as to the specific set of smoke-free spaces, the reference to 'appropriate, other public places' requires further scrutiny. Thus, rendering the enclosed spaces used by an educational institution smoke-free is straightforward. What of spaces, however, shared by educational institutions and companies, namely enclosed or open air spaces co-owned by public and private entities ? What of student houses located on a campus, namely enclosed and/or open air spaces owned by an educational institution ? What of open roads, bicycle paths or footpaths, namely open air spaces owned by the educational institutions or the municipalities that are destined for public use ?

Article 8 of the FCTC provides for the creation of smoke-free zones 'as appropriate, [in] other public places'. The interpretation of such an open-ended provision<sup>33</sup> can be guided by the official Guidelines for implementation of Article 8 (Guidelines).<sup>34</sup> While these Guidelines are not legally binding, they nonetheless provide authoritative guidance for the interpretation of the treaty obligations.<sup>35</sup> The term of 'public places' in Article 8 is defined

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<sup>30</sup> Interestingly enough, the Decree of 22 June 2020 makes no reference to the FCTC. It rather specifies that the law and underlying regulations are largely an implementation of Directive 2014/40/EU on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products and repealing Directive 2001/37/EC [2014] L 127/1: see Decree of 22 June 2020, *supra* n 3 at Explanatory Note.

<sup>31</sup> The FCTC had 181 State Parties on 1 August 2020: see United Nations Treaty Collection, 'WHO Framework Convention on Tobacco Control', available at: [treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtidsg\\_no=IX-4&chapter=9&clang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtidsg_no=IX-4&chapter=9&clang=en) [last accessed 20 August 2020].

<sup>32</sup> Emphasis added.

<sup>33</sup> Gispén, 'Expanding smoking bans in public spaces in light of international law', *GHLG Blog*, 13 August 2018 [last accessed 20 August 2020].

<sup>34</sup> WHO, *Guidelines for implementation of Article 8 - Protection from exposure to tobacco smoke*, adopted by the Conference of the Parties at its second session (decision FCTC/COP2(7)), July 2007 ('Guidelines for implementation of Article 8 FCTC'), [last accessed 20 August 2020].

<sup>35</sup> Negri, 'Smoke-free environments: lessons from Italy' in Gispén and Toebe (eds), *Human Rights in Tobacco Control* (2020) at 210.



on the basis of a functional criterion. While the Guidelines acknowledge that the precise definition of ‘public places’ can vary between jurisdictions, they nonetheless underline the importance of defining this term as broadly as possible on the basis of their use.<sup>36</sup> The Guidelines state that the ‘definition used should cover all places accessible to the general public or places for collective use, regardless of ownership or right to access’.<sup>37</sup> The spaces shared by educational institutions and companies, thus, can become smoke-free even if co-owned by public and private entities, since their use is collective.

The question remains, however, open as to the outdoor or quasi outdoor spaces. The Guidelines explicitly refer to this scenario. As it is stated, the ‘language of the treaty requires protective measures not only in all “indoor” public places, but also in those “other” (that is, outdoor or quasi-outdoor) public places where “appropriate”’.<sup>38</sup> In general, Article 8 builds on two fundamental pillars : first on the idea of universal protection and second on the [progressing] scientific evidence as to the possible health hazards from exposure to smoke. Article 8 ‘creates an obligation to provide universal protection by ensuring that all indoor public places, all indoor workplaces, all public transport and possibly other (outdoor or quasi-outdoor) public places are free from exposure to second-hand tobacco smoke’.<sup>39</sup> For the identification of those outdoor and quasi-outdoor public places where legislation is appropriate, ‘Parties should consider the evidence as to the possible health hazards in various settings and should act to adopt the most effective protection against exposure wherever the evidence shows that a hazard exists’.<sup>40</sup> The Guidelines thus acknowledge the non-static character of the spaces that need to become smoke-free and endorse the idea of a progressive expansion of the smoke-free zones on the basis of the evolving scientific evidence.<sup>41</sup> According to Principle 7 of the Guidelines :

The protection of people from exposure to tobacco smoke should be strengthened and expanded, if necessary ; such action may include new or amended legislation, improved enforcement and other measures to reflect new scientific evidence and case-study experiences.<sup>42</sup>

However, as Gispén observes, the reference to evidence, ‘should not be understood as evidence about the harmfulness of exposure to tobacco smoke *per se*’.<sup>43</sup> Article 8 (1) of the FCTC clearly stipulates that ‘Parties recognize that scientific evidence has unequivocally

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<sup>36</sup> Guidelines for implementation of Article 8 FCTC, *supra* n 34 at para 18.

<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid.* at para 27.

<sup>39</sup> *Ibid.* at para 24.

<sup>40</sup> *Ibid.* at para 27.

<sup>41</sup> This is in conformity with evolutive interpretation on the basis of evolution of fact: see Georgopoulos, ‘Le droit intertemporel et les dispositions conventionnelles évolutives – quelle thérapie contre la vieillesse des traités?’ (2004) 108(1) *Revue générale de droit international public* 123 at 132-134. Medical and scientific advancements qualify as examples of what the International Court of Justice has considered as evolution of fact: see *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* Merits, Judgment, ICJ Reports 1997, 7 at paras 104 and 107.

<sup>42</sup> Guidelines for implementation of Article 8 FCTC, *supra* n 34 at para 12.

<sup>43</sup> Gispén, *supra* n 33.

established that exposure to tobacco smoke causes death, disease and disability'. The question arising every time is therefore whether the exposure to smoke in a certain space is indeed hazardous in light of the available scientific evidence<sup>44</sup> and whether the introduction of smoke-free regulation is the most effective means of protection against those effects. The 2020 Dutch Decree acknowledges the relevance of scientific evidence to the expansion of smoke-free spaces and provides for the relevant information in its Explanatory Note, thus justifying the decision of the Dutch legislator to introduce such smoke-free spaces.<sup>45</sup>

While the introduction of smoke-free zones in public spaces, indoor, outdoor and quasi-outdoor can be justified on the basis of these observations, the case of smoke-free homes, namely spaces for private use is more complex. The Guidelines on Article 8 of the FCTC note that public education campaigns 'should also target settings for which legislation may not be feasible or appropriate, such as private homes'.<sup>46</sup> This statement seems to acknowledge the legal impediments surrounding the regulation of smoke-free homes. Thus, in spaces, such as private homes, where the implementation of a smoking ban might not be feasible or appropriate, less intrusive measures such as public education campaigns are recommended instead. This does not, however, exclude the possibility of eventually introducing smoke-free homes. After all the Guidelines state :

Careful consideration should be given to workplaces that are also individuals' homes or dwelling places, for example, prisons, mental health institutions or nursing homes. These places also constitute workplaces for others, who should be protected from exposure to tobacco smoke.<sup>47</sup>

The Explanatory Note of the 2020 Dutch Decree envisages the possibility of homes owned or managed by the university to be rendered smoke-free if they fulfil the criteria set by the new regulation (Article 6.4). As it is specifically envisaged, however, if these campus homes are not used for education, and the surrounding grounds (often a lawn) are not used by the faculty, but by the residents of the student house, then no smoking ban needs to be introduced.<sup>48</sup> Special attention is required though with respect to campus homes in case they also qualify as workplaces or are designated for collective use. In this scenario, the adoption of appropriate smoke-free measures needs to be considered.

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<sup>44</sup> The degree of scientific evidence is not specified by the Conference of the Parties (COP) to the FCTC. Gispén opines that the 'COP does not specify what it means by 'hazardous', but in the spirit of the guidelines for implementation, a broad interpretation seems fitting': see Gispén, *supra* n 33.

<sup>45</sup> Decree of 22 June 2020, *supra* n 3 at Explanatory Note.

<sup>46</sup> Guidelines for implementation of Article 8 FCTC, *supra* n 34 at para 29.

<sup>47</sup> *Ibid.* at para 21.

<sup>48</sup> Decree of 22 June 2020, *supra* n 3 at Explanatory Note.

### 3. COMPATIBILITY WITH THE RIGHT TO RESPECT FOR PRIVATE LIFE UNDER ARTICLE 8 EUROPEAN CONVENTION ON HUMAN RIGHTS

The new Dutch regulation does not solely raise global health-related considerations. The introduction of smoke-free zones raises human rights questions as well, to the extent that it interferes with a number of freedoms and most importantly the right to respect for the private life of smokers. However, the global health and human rights-related considerations are interconnected. Interestingly, the Explanatory Note of the 2020 Dutch Decree discusses Article 8 of the ECHR, acknowledging that an extension of a smoking ban could be seen as an interference with the free development of the private life of smokers.<sup>49</sup> Under the right to respect for private life, there are many different ways to describe this interference from the smokers' perspective : interference with the right to personal development (personality or personal autonomy) ; interference with the right to a 'private social life'; limitation of smokers' life choices ; interference with their lifestyle ; reduction of their immediate personal autonomy ; interference with their freedom of movement ; and under certain circumstances, interference with the peaceful enjoyment of their home (privacy).

While a smoking ban in the interest of public health qualifies as an interference with the right to respect private life of those who wish to smoke in the smoke-free zones, it does not as such automatically constitute a violation of this right. To assess whether Article 8 is violated or not, a balancing test needs to be applied between respecting the right to private life and protecting the health of the population and the rights of others, namely the right to health of individuals exposed to passive smoking.

To discuss the compatibility with the right to private life under Article 8 of the ECHR, the following discussion will first explore the connections between the FCTC and the ECHR (Section A), since, as it will be demonstrated, they are relevant to the balancing test under Article 8, which will be accordingly scrutinised (Section B).

#### A. Framework Convention on Tobacco Control and European Convention on Human Rights

The ECHR does not enshrine the right to health. However, this does not mean that health is not protected by the ECHR system at all. First, the interpretation given to a number of ECHR provisions – such as Article 2 (the right to life), Article 3 (prohibition of torture and inhumane and degrading treatment) and Article 8 (the right of respect for private and family life) – by the European Court of Human Rights (ECtHR or 'the Court') supports a number of aspects inherent in the individual right to health and/or public health.<sup>50</sup> Second, the protection of health is a ground justifying restrictions on the exercise of the rights enshrined in Articles 8 (right to respect for private and family life), 9 (freedom of thought, conscience

<sup>49</sup> Ibid.

<sup>50</sup> See Hendriks, 'The Council of Europe and Health and Human Rights' in Toebe et al. (eds), *Health and Human Rights in Europe* (2012) at 21 *et seq.*

and religion), 10 (freedom of expression) and 11 (freedom of assembly and association) and Article 2 of Protocol No 4 to the ECHR (freedom of movement).

Even though the FCTC does not qualify as a human rights treaty, the right to health is central to it : the FCTC is ‘an evidence-based treaty that reaffirms the right of all people to the highest standard of health’.<sup>51</sup> While the right of all people to the highest standard of health<sup>52</sup> is indeed referred to in the FCTC, the human rights dimensions of tobacco control are rather absent from this treaty. Taylor and McCarthy attribute this deliberate inattention to human rights to the views on the intersection between human rights and tobacco dominant in the 1990s. As they note : ‘Up to that point (and even for some years after), the tobacco industry had co-opted the language of human rights to promote its own interests, specifically portraying tobacco control as an infringement on personal autonomy and economic rights.’<sup>53</sup>

Since the drafting of the FCTC, however, the relation between human rights and tobacco control have significantly evolved to mutually reinforce each other.<sup>54</sup> The human rights framework can now be used as an interpretative aid for defining the meaning of the FCTC provisions and, *vice versa*, the FCTC can be used as a standard for the delineation of State obligations under international human rights law.

The ECtHR has partially tapped this potential in two cases on tobacco advertising, namely in *Hachette Filipacchi Presse Automobile and Dupuy v France*<sup>55</sup> and *Société de Conception de Presse et d’Edition and Ponson v France*,<sup>56</sup> decided in 2009. The cases concerned the conviction of the applicant publishers of two magazines, and their publication directors, for illegally advertising tobacco products in violation of French law aiming at the protection of public health.<sup>57</sup> In both cases, the Court found no violation of the applicants’ rights under Article 10 of the ECHR, which guarantees freedom of expression, considering the conviction of publishers for illegally advertising tobacco to be compatible with the

<sup>51</sup> World Health Organization, [WHO Framework Convention on Tobacco Control](#) (2003, updated reprint 2004), at Foreword, [last accessed 20 August 2020].

<sup>52</sup> The FCTC States Parties explicitly recall in the Preamble three of the core international human rights instruments, namely the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child.

<sup>53</sup> Taylor and McCarthy, ‘Human rights in the origins of the FCTC’ in Gispén and Toebes (eds), *supra* n 35 at 160.

<sup>54</sup> See Conference of the Parties to the WHO Framework Convention on Tobacco Control, *Decision: International cooperation for implementation of the WHO FCTC, including on human rights*, 12 November 2016, FCTC/COP7(26). The Conference of the Parties ‘[r]ecall ... the human rights reflected in the WHO FCTC and acknowledging the relationship between tobacco use and human rights’. See also Global Forum on Human Rights and a Tobacco-Free World, [COP8 Policy Briefing: Achieving greater integration of FCTC and human rights norms](#), 1-6 October 2018 [last accessed 20 August 2020].

<sup>55</sup> *Hachette Filipacchi Presse Automobile and Dupuy v France* Application No 13353/05, Merits, 5 March 2009 (no violation of Article 10 ECHR).

<sup>56</sup> *Société de Conception de Presse et d’Edition and Ponson v France* Application No 26935/05, Merits, 5 March 2009 (no violation of Article 10 ECHR).

<sup>57</sup> *Hachette Filipacchi Presse Automobile v France*, *supra* n 55 at para 46; *Société de Conception de Presse et d’Edition and Ponson v France*, *ibid.* at para 56.

Convention's requirements.<sup>58</sup> For the first time the Court referred to the FCTC as an external source to inform the content of the Convention provisions. The ECtHR emphasised the general trend towards tobacco advertising regulation that was then displayed worldwide, including citing the FCTC in the section of the judgments dealing with 'relevant domestic and international law'.<sup>59</sup> This reference to the FCTC was very important to the extent that it was a factor considered relevant to the Court's assessment of European consensus on the regulation of tobacco advertising.

A similar approach can be adopted with respect to the introduction of smoke-free zones. The FCTC can be used as an interpretative aid for the delineation of States' positive obligations in introducing and expanding smoke-free zones in the interest of protecting the individual right to health<sup>60</sup> or, similar to the case under discussion, for the consideration of health as an interest justifying an interference to the rights enshrined in the Convention, such as the right to respect of private life.

## **B. The Balancing Test under Article 8 European Convention on Human Rights**

Smoke-free spaces-related cases have been examined by the European Court of Human Rights mostly through the lens of the States' positive obligation to protect individuals from exposure to smoke.<sup>61</sup> The Court is yet to conduct a balancing exercise under Article 8(2) in relation to an interference with the right to respect for an individual's private life by smoke-free regulations (i), exploring thus whether the interference is justified (i. e. is in accordance with the law, pursues a legitimate aim and is necessary in a democratic society) (ii).<sup>62</sup>

<sup>58</sup> *Hachette Filipacchi Presse Automobile v France*, *ibid.* at para 53; *Société de Conception de Presse et d' Edition and Ponson v France*, *ibid.* at para 64.

<sup>59</sup> *Hachette Filipacchi Presse Automobile v France*, *ibid.* at para 24; *Société de Conception de Presse et d' Edition and Ponson v France*, *ibid.* at para 27.

<sup>60</sup> *Wöckel v Germany* Application No 32165/96, Admissibility, 16 April 1998. In 1995, long before the adoption of the FCTF, Mr Wöckel lodged an application complain that the failure of the State to enact legislation prohibiting smoking in public with a view to protecting non-smokers was a breach of his rights under Articles 2 (right to life) and 8 (right for respect of private and family life) ECHR. The application was declared inadmissible for being manifestly ill-founded given the State's margin of appreciation.

<sup>61</sup> See *Wöckel v Germany*, *ibid.* Most of the relevant case-law pertains to smoke-free detention spaces. The Court has examined a number of applications by persons in detention complaining of secondary smoke exposure under Articles 3 and 8 of the ECHR: see, for example, *Stoine Hristov v Bulgaria* Application No 36244/02, Merits and Just Satisfaction, 16 October 2008 and *Florea v Romania* Application No 37186/03, Merits and Just Satisfaction, 14 September 2010. In *Stoine Hristov* (at para 37), the Court accepted that that a non-smoking prisoner was obliged to share an environment where smoking is allowed in certain spaces may constitute an interference with his personal life under Article 8(1) of the ECHR. The Court focused its attention on the fact that the authorities did not take the necessary measures to protect the applicant from the negative effects of passive smoking, but given the specific circumstances of the case it did not offer a conclusive answer as to whether the State has the obligation to detain smokers and non-smokers in separate spaces (see paras 41 and 43). In the landmark case of *Florea v Romania*, examined under Article 3 of the ECHR, the Court emphasized that incarceration does not mean a detainee loses the benefit of the rights guaranteed by the Convention. In this context, the Court noted (at paras 50 and 61) the State's positive obligation to take measures necessary to protect the detained person from the negative effects of passive smoking if his/her health condition requires it.

<sup>62</sup> The balancing test the Court applies pertains to claims by non-smokers for secondary smoke exposure. Given the nature of the claims in *Wöckel v Germany*, *supra* n 60, the Commission undertook a balancing test, noting 'the



However, the existing case-law both on tobacco control and on Article 8 provide for sufficient guidance as to the balancing test that may be applied should such a case manifest itself.

### *i. Existence of interference with private life*

The 2020 Dutch Decree with its smoking ban, just like other such laws, can indeed be seen as an interference with private life to the extent that it limits the self-determination of the person who wants to smoke in educational institutions, even if smoking is dangerous to his or her health. In a different, yet partially comparable context, namely with respect to the right to refuse medical treatment or to request its discontinuation, the Court has acknowledged that ‘[t]he ability to conduct one’s life in a manner of one’s own choosing includes the opportunity to pursue activities perceived to be of a physically harmful or dangerous nature for the individual concerned’.<sup>63</sup> Smoking also arguably falls within the ambit of this free choice and self-determination. However, this freedom is not unlimited. The Court accepted this freedom ‘absent any indication of the need to protect third parties’.<sup>64</sup> In the case of smoking, this point is of particular pertinence. Smoking, a hazardous activity, includes harming the health and endangering the life of others qualifying, thus, as a threat to the lives of others.

### *ii. Whether the interference is justified*

The new Dutch regulation is in conformity with the requirements of the Convention, to the extent that the interference with private life it implies is in accordance with the law, pursues a number of legitimate aims and is necessary in a democratic society.

#### *(a.) In accordance with the law*

The interference at hand results from the introduction of smoking bans by the 2020 Dutch Decree that amends the existing legislative framework. As the Explanatory Note of the

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competing interests of the applicant as a non-smoker and of the interests of other individuals to continue smoking’ and the State’s margin of appreciation in the ‘sphere of relations between individuals between themselves’ as well as the State’s action to regulate smoking in public areas and the policy choices involved. In *Aparicio Benito v Spain* Application No 36150/03, Admissibility, 13 November 2006, the Court refers to the regulation of the ‘right to smoke’ in detention centres. Often the dilemma of banning or not smoking in prisons is connected to the balancing test between the rights of smokers and non-smokers. See, for example, Maes, ‘Legal implications of smoking (bans) in English prisons’ (2019) 39 *Legal Studies* 321-338 at 333 stating that ‘a complete smoking ban tilts the balance of rights completely in favour of protection of non-smoking prisoners and prison staff’s health, and deprives smoking prisoners of their right to private life and autonomy’. The ban constitutes ‘an erosion of yet another freedom of an already disenfranchised group’. However, the Court itself does not engage in a balancing test of this nature when deciding cases on tobacco control in places of detention.

<sup>63</sup> *Jehovah’s Witnesses of Moscow and Others v Russia* Application No 302/02, Merits and Just Satisfaction, 10 June 2010, at paras 135-136.

<sup>64</sup> *Ibid.*



Decree specifies, this amendment makes such a measure foreseeable by law.<sup>65</sup> It can be, thus, accepted that the interference is ‘prescribed by law’.

(b.) Legitimate aims

The introduction of smoke-free spaces pursues a number of legitimate aims.<sup>66</sup> The right to respect for the private life of those who wish to smoke in educational institutions needs to be balanced against public health and the rights of others, namely those who are exposed to passive smoking. The protection of health and of the rights of others qualify as legitimate aims permitting interference with the right to respect for private life set out in Article 8(2) of the ECHR. The danger to the health of others resulting from exposure to second-hand smoking calls for the protection of third parties, in particular, but not necessarily exclusively, non-smokers. In a more holistic approach, smoking qualifies as a public health issue and the introduction of smoke-free zones aims at tackling this concern.

In the case of smoke-free zones, the fundamental considerations of public health prevail over the right to respect for personal life. Such a finding is consistent with the Court’s case-law on tobacco advertising under Article 10 of the ECHR. In the case of tobacco advertising the Court accepted, that ‘[f]undamental considerations of public health [...] could prevail over economic imperatives and even over certain fundamental rights such as freedom of expression’.<sup>67</sup> This is exactly the case here, with fundamental considerations of public health prevailing even over a fundamental right such as the right to respect for private life.

Given the public health dimension to the regulation of smoking in public places, it is pertinent to draw some parallels, in particular, with the Court’s stance on the fight against doping in its 2018 Grand Chamber judgment in *National Federation of Sportspeople’s Associations and Unions (FNASS) and Others v France*.<sup>68</sup> In this case the Court examined the compatibility of the requirement for elite athletes in a ‘target group’ to keep authorities informed of their whereabouts for purposes of random drug testing with Article 8. The whereabouts system also had implications for their enjoyment of their home lives, since intrusive anti-doping tests could have been carried out at their homes. The fight against doping bears some similarities with the fight against tobacco use since the regulations are aimed at, among other concerns, public health issues, with a focus on young people, and a number of smoke-free measures pertain to smoking in (semi)private spaces.

In *FNASS* the Court accepted that the French measures against doping were designed to address issues concerning ‘health’, within the meaning of Article 8(2) of the ECHR, but

<sup>65</sup> Decree of 22 June 2020, supra n 3 at Explanatory Note.

<sup>66</sup> The Decree of 22 June 2020 seems to mostly focus on public health: Ibid.

<sup>67</sup> *Hachette Filipacchi Presse Automobile v France*, supra n 55 at para 46 (author’s translation). See also *Société de Conception de Presse et d’Édition and Ponson v France*, supra n 56 at para 56.

<sup>68</sup> *National Federation of Sportspeople’s Associations and Unions (FNASS) and Others v France* Applications Nos 48151/11 and 77769/13, Merits and Just Satisfaction, 18 January 2018.

also went further to consider the protection of morals as a legitimate aim pursued by the measures at hand, as it has been suggested by the French government.<sup>69</sup> The Court considered that what the government described as ‘morals’ is linked to the legitimate aim of ‘protection of the rights and freedoms of others’, acknowledging that doping implies a ‘dangerous incitement to amateur athletes and in particular young people to follow suit in order to enhance their performance’.<sup>70</sup> A similar approach can be applicable in the context of smoke-free regulation, arguing that such a regulation pursues the legitimate aim of ‘protection of the rights and freedoms of others’ also to the extent that it addresses the confrontation of young people with smoking in educational institutions.<sup>71</sup>

### (c.) Necessary in a democratic society

The protection of the youth from smoking is a particularly relevant consideration. When examining the necessity of restricting tobacco advertising, the Court considered the measure an essential part of a broader strategy in the fight against the social evil of smoking.<sup>72</sup> The depiction of smoking as a ‘social evil’ is strongly connected, for the Court, to its impact on young people. The Court had noted the adverse impact of tobacco advertising on young people, in particular their vulnerability to this form of influence.<sup>73</sup> More precisely, it accepted that the fact that tobacco advertising is capable of inciting people, particularly young people, to consume such products is a ‘relevant’ and ‘sufficient’ reason to justify the interference.<sup>74</sup>

This is not the only case the Court accepted the depiction of smoking as something evil. The applicants in *FNASS* drew parallels between the fight against doping and the fight against tobacco. They relied on, in particular, the French authorities’ alleged lack of action with regard to ‘the major public-health issues of smoking and alcohol abuse’<sup>75</sup> as a source of injustice to themselves, arguing that ‘there was no real reason to protect athletes’ health any more than the health of pregnant women who smoked’.<sup>76</sup> To address this claim the Court noted that ‘[e]ven assuming the applicant’s claim [with respect to tobacco control] to

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<sup>69</sup> Ibid. at paras 165-166.

<sup>70</sup> Ibid. at para 166.

<sup>71</sup> See, Decree of 22 June 2020, supra n 3 at Explanatory Note: ‘Not only non-smokers are protected against tobacco smoke, young people are also less confronted with smoking, which can reduce smoking prevalence in the long term. Every young person who is prevented from smoking at school is potentially less of an addicted smoker in the future’ (author’s translation).

<sup>72</sup> *Hachette Filipacchi Presse Automobile v France*, supra n 55 at para 46. See also *Société de Conception de Presse et d’Edition and Ponson v France*, supra n 56 at para 56.

<sup>73</sup> *Hachette Filipacchi Presse Automobile v France*, ibid. at para 50; *Société de Conception de Presse et d’Edition and Ponson v France*, ibid. at para 60.

<sup>74</sup> *Hachette Filipacchi Presse Automobile v France*, ibid. at para 48; *Société de Conception de Presse et d’Edition and Ponson v France*, ibid. at para 58.

<sup>75</sup> *National Federation of Sportspersons’ Associations and Unions (FNASS) and Others v France*, supra n 68 at para 120.

<sup>76</sup> Ibid. at para 140.

be well-founded, it does not justify a failure by the authorities to take action against doping, which would be tantamount to saying that two wrongs cancel each other out.’<sup>77</sup>

The dangers of smoking are of course of particular relevance for the balancing exercise. The new Dutch regulation builds on specific scientific evidence as per the dangers of smoking and accordingly justifies the decision to introduce novel smoke-free zones in educational institutions. The Explanatory Note to the 2020 Dutch Decree itself analyses the necessity of the ban in light of the scientific evidence on the health risks inherent in smoking. For example, approximately 20,000 people die annually from smoking, while every day an average of 75 young people under the age of 18 years start smoking daily and about half of all smokers have their first cigarette in the schoolyard.<sup>78</sup> As per the proportionality of the measure the Explanatory Note to the 2020 Dutch Decree specifies that a less far-reaching measure, such as a smoking ban that only applies to pupils or students, or a smoking ban that allows exceptions for certain zones, would undermine the effectiveness of a smoking ban.<sup>79</sup> Certainly, one of the often cited grounds of opposition to the introduction of open-air smoke-free zones is the allegedly limited or partial scientific evidence proving the health hazards to others of smoking in outdoor spaces. The Court’s reasoning in *FNASS* offers guidance as per this point too. In *FNASS* the Court accepted that the scientific complexities and the current stage of scientific research afforded the States a wide margin of appreciation in the area of doping regulation, even if other types of measures, often less intrusive, might continue to exist in other Council of Europe Member States.<sup>80</sup> A similar approach can be applicable in the case of novel smoke free spaces.<sup>81</sup> Such an approach opens the prospect for the expansion of novel smoke-free zones with the ban of smoking in outdoor spaces such as streets in general, especially when smoke-free regulations that are consistent with the Guidelines on Article 8 of the FCTC.

The common international-law standards which form the background to the legal question before the Court are a factor which it takes into account in deciding whether the interference at issue is necessary in a democratic society. Considering the FCTC standards, the introduction of (novel) smoke-free zones in Dutch educational institutions can be seen as necessary in a democratic society. The Court underlined in *FNASS* the trend towards strengthening and intensifying doping controls by pointing at both the wide ratification of the International Convention against Doping in Sport, adopted under the auspices of

<sup>77</sup> Ibid. at para 189.

<sup>78</sup> Decree of 22 June 2020, supra n 3 at Explanatory Note.

<sup>79</sup> Ibid. Given the importance of the effectiveness of measures for the protection against exposure to smoke for the FCTC (see also, Gispén, supra n 33), it should be noted that the necessity test under the ECHR the Court is not fully dependent on the effectiveness of the introduction of smoke free zones alone. In *FNASS* the Court was ‘mindful of the fact that the tests made possible by the whereabouts requirements for athletes are just one aspect of action to tackle doping, which has numerous other aspects’ (*National Federation of Sportspersons’ Associations and Unions (FNASS) and others v France*, supra n 68 at para 188).

<sup>80</sup> *National Federation of Sportspersons’ Associations and Unions (FNASS) and Others v France*, ibid. at para 182.

<sup>81</sup> Cf. with the discussion on European consensus when the claim brought before the Court pertains to the absence of measures for the protection from exposure to smoke. See, for example, *Aparicio Benito v Spain*, supra n 62.

UNESCO,<sup>82</sup> and the gradual construction of antidoping programmes that has resulted in an international legal framework of which the World Anti-Doping Code WADC – a non-binding instrument – is the main instrument.<sup>83</sup> The same can be argued for the introduction and expansion of smoke-free zones considering the specialised international framework and standards, including those which are non-binding. The FCTC, adopted under the auspices of the World Health Organization (WHO) – a specialised United Nations agency – is an equally widely ratified instrument and its Guidelines, even though non-binding as such, are demonstrative of the trend towards the introduction of smoke-free zones. The Dutch approach to smoke-free zones, thus, aligns with the consensus that emerges from the specialised international instruments.

(d.) Striking a balance in the case of smoke-free zones

Notwithstanding the aforementioned observations, the States are not given a *carte blanche* for disregarding smokers' altogether. Two more observations are relevant in this respect, inspired by the Court's approach in *FNASS*.

First, the compatibility of the smoking bans with the right to respect for private life is dependent on the existence of certain procedural safeguards.<sup>84</sup> In the case of smoking, these safeguards can vary and include measures such as the inclusion of smokers in the relevant decision-making procedures at the national or sub-national level, the possibility of challenging any sanctions imposed before the administrative courts to avoid the risk of abuse and the development of mechanisms for the support of smokers to avoid their stigmatisation or to help them quit smoking. The existence of procedural safeguards is particularly pressing in the case of regulation for smoke-free private homes. The advocacy for smoke-free homes is based in particular on the protection from exposure to smoke of vulnerable individuals,<sup>85</sup> such as children,<sup>86</sup> who share the same private space with smokers. Would a smoking ban implemented in private homes be in conformity with the

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<sup>82</sup> The UNESCO Convention has been ratified by France and by 186 other States: *National Federation of Sportspersons' Associations and Unions (FNASS) and Others v France*, supra n 68 at para 54.

<sup>83</sup> Ibid.

<sup>84</sup> Ibid. at paras 185-187.

<sup>85</sup> One of the most frequently cited reasons for the introduction and maintenance of home smoking rules is to protect the health of vulnerable others such as unborn babies, children, grandchildren, sick adults, adults and non-smokers: see Passey et al., [‘Smoke-free homes: What are the barriers, motivators and enablers? A qualitative systematic review and thematic synthesis’](#) (2016) *BMJ Open* [last accessed 20 August 2020].

<sup>86</sup> Measures for the protection against smoke exposure are necessary especially in cases where the health of children is at stake. Such a case, namely *G.B. and Others v Turkey* Application No 4633/15, 17 October 2019, was recently decided, without the Court, however, elaborating on the claim relating to smoke exposure. In this case, a mother and her minor children complained about their unlawful detention in the immigration context, submitting *inter alia* that the detention center where they were kept had not been sufficiently lit, heated and ventilated, and that they had been exposed to tobacco smoke at all times of the day in breach of Article 3 of the ECHR. The Court noted (at para 110) that '[a]s for the issue of passive smoking, which the Court has found problematic even in respect of adult detainees (see, for instance, *Florea v. Romania*, no. 37186/03, §§ 57-62, 14 September 2010), the Government have not submitted any comments whatsoever' and found a violation of Article 3 in respect of the totality of the applicants' conditions of detention.

peaceful enjoyment of one's home under Article 8 of the ECHR ? Such a regulation would be compatible with Article 8 if all the above criteria (i. e. the interference is in accordance with the law, pursues a legitimate aim and is necessary in a democratic society) are fulfilled. Its implementation, however, might need to take place in a different context than the bans implemented in public spaces. In *FNASS*, the use of private spaces such as the applicants' homes for doping control purposes would be 'at [their] request and within a fixed time slot' required in order to ensure the effectiveness of doping controls.<sup>87</sup> The Court would thus inferred that

these tests are carried out in a context that is very different from that of checks conducted under the supervision of the courts for the purpose of investigating offences and potentially giving rise to seizures... These last, by definition, go to the core of the right to respect for the home and the tests in question cannot be equated with them.<sup>88</sup>

Thus in the case of smoking bans in private homes, their implementation could take a form that differs from checks conducted under the supervision of the courts for the purpose of investigating offences. Smokers are not criminal offenders but often people suffering from addiction.

Second, the respect of smoke-free regulation requires significant effort on the part of smokers and this should be particularly acknowledged.<sup>89</sup> The Court's wording in *FNASS* is demonstrative of the realism and the sensitivity a human rights body should exhibit in such cases. The Court noted in particular that it

does not underestimate the impact of the whereabouts requirements on the applicants' private lives. Nevertheless... [r]educing or removing the requirements of which the applicants complain would be liable to increase the dangers of doping to their health and that of the entire sporting community, and would run counter to the European and international consensus on the need for unannounced testing.<sup>90</sup>

A similar acknowledgment should be made in the case of smoking, as smokers are practically invited to accept their fair share of the constraints inherent in the measures

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<sup>87</sup> *National Federation of Sportspersons' Associations and Unions (FNASS) and others v France*, supra n 68 at para 186.

<sup>88</sup> *Ibid.*

<sup>89</sup> The Explanatory Note to the 2020 Dutch Decree notes the inconvenience to pupils, students, employees, suppliers and other visitors who may no longer choose to smoke on the premises: Decree of 22 June 2020, supra n 3 at Explanatory Note.

<sup>90</sup> *National Federation of Sportspersons' Associations and Unions (FNASS) and others v France*, supra n 68 at para 191.



needed to combat the scourge of smoking.<sup>91</sup> Given the endemic nature of smoking, the acceptance of such constraints is required for combatting the problem effectively.

#### 4. CONCLUSION

The 2020 Dutch Decree requires that a smoking ban must be introduced, designated and enforced in schools and other educational institutions in that State. This marks an important development in new smoke-free regulation in the Netherlands for the protection of health with an emphasis on youth and the creation of a smoke-free generation. Depending on the circumstances, the smoking ban may apply to open air spaces, sports fields, sites shared by educational institutions and companies, student houses located on a campus, open roads, bicycle paths or footpaths on a campus site for public traffic. The new regulation can, thus, also qualify as a ‘novel smoke-free policy’ since it does not only cover enclosed public places but goes beyond to ban smoking in outdoor and semi-private spaces.

This article has examined the compatibility of such a regulation with the lawfulness, the legitimate aims of the interference and the necessity for the interference under Article 8(2) of the ECHR to conclude that the introduction of novel smoke-free spaces does not constitute a violation of the right to respect of private life of those who wish to smoke in such spaces guaranteed under Article 8(1) of the ECHR. The regulation of smoke-free spaces is in conformity with global health standards and in particular with the FCTC. In light of the FCTC requirements, States are required to adopt and implement measures, provide for protection from exposure to tobacco smoke not only in indoor workplaces, public transport, indoor public places but also, as appropriate, in other public places, namely places accessible to the general public or places for collective use. The standards set by this international instrument are of relevance for the determination of State obligations under the ECHR itself.

It is accepted that smoking bans interfere with the rights of smokers under Article 8 of the ECHR. However, this does not necessarily constitute a breach of that right. The Explanatory Note of the Dutch Government to the 2020 Dutch Decree explains that the introduction of smoke-free educational institutions is not about enforcing lifestyle behaviour by legislation.<sup>92</sup> Smoking is not a lifestyle, but a serious addiction with serious health consequences.<sup>93</sup> This is a particularly pertinent observation for human rights purposes that goes both ways. On the one hand, it points at the necessity of smoke-free regulation in a democratic society but on the other hand, it reminds us that smokers are individuals often exposed to this serious addiction who should be supported for the global fight against the dangers of smoking to be an efficient and human rights-compliant o

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<sup>91</sup> Smoking, similarly to doping, is of endemic nature but, as the Court noted in *FNASS* (ibid. at para 188), ‘the allegedly endemic nature of doping in sports cannot call into question the legitimacy of efforts to tackle it; on the contrary, it justifies the desire of the authorities to succeed in so doing.’

<sup>92</sup> Decree of 22 June 2020, supra n 3 at Explanatory Note.

<sup>93</sup> Ibid.